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BUMBO (PTY) LTD.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DYLAN LAMM, a minor by and
through his guardian ad litem, MARY
CATHERINE DOHERTY; and KEVIN
LAMM,

Plaintiffs,

vs.

BUMBO, BUMBO LIMITED, BUMBO
(PTY) LTD.; TARGET
CORPORATION; and DOES 1 to 20,

Defendants.

Case No. CV07-4807 MHP

**REPLY TO PLAINTIFFS'
OPPOSITION TO DEFENDANT
BUMBO (PTY) LTD'S AMENDED
MOTION TO QUASH SERVICE
AND DISMISS FOR
INSUFFICIENT SERVICE OF
PROCESS AND LACK OF
PERSONAL JURISDICTION**

Date: March 24, 2008
Time: 2:00 p.m.
Place: Courtroom of the Hon.
Marilyn Hall Patel

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INTRODUCTION

Defendant Bumbo (Pty) Ltd. (“Bumbo-Pty”) hereby files its reply to plaintiffs’ opposition to defendant Bumbo (Pty) Ltd.’s amended motion to quash and motion to dismiss (the latter hereinafter “Opposition”). Instead of addressing the open and obvious service issues in Bumbo-Pty’s amended motion, plaintiffs are attempting to “back door” Bumbo-Pty into this lawsuit by claiming effective service on Bumbo-Pty or, failing that, asking the Court to override and negate the applicable rules of service.

Plaintiffs have the burden of proof to establish that they have effected service of the summons and complaint on Bumbo-Pty and have failed to meet it. Plaintiffs quite simply have failed to serve Bumbo-Pty, a South African company, in a way that is consistent with U.S. and South African law and are now asking the Court to ratify plaintiffs’ deficient service by saying, “Gosh, it ought to be okay.” Accordingly, the Court should not accept plaintiffs’ invitation because plaintiffs made absolutely no effort to effect service properly on Bumbo-Pty, a foreign company with its headquarters and manufacturing site outside the U.S. The Court should reject such an invitation to mischief at the expense of basic procedural law with which all litigants are expected to comply.

Based also on the plaintiffs’ irregularly attempted service on a non-existent entity that is the subject of the hearing scheduled on March 10, 2008, and taken under submission, it appears that plaintiffs’ counsel would instead prefer to attempt to “wear down” Bumbo-Pty to the point where Bumbo-Pty tires of insisting that all applicable rules of civil procedure be scrupulously followed. Based upon plaintiffs’ repeated unwillingness to follow the most fundamental rules in service of process against a non-U.S. company and plaintiffs’ repeated failure to establish personal jurisdiction of Bumbo-Pty in this matter, this action should be dismissed

1 in its entirety as against Bumbo-Pty.

2 **ARGUMENT**

3 **I**

4 **PLAINTIFFS' OPPOSITION FAILS TO ESTABLISH**
 5 **THAT PLAINTIFFS HAVE PROPERLY SERVED BUMBO (PTY) LTD.**

6 Service of process requirements must be strictly enforced so that all litigants
 7 are on an equal playing field. In objecting to a motion to quash service, plaintiffs
 8 have the burden of assuring the Court that a defendant has been properly served in
 9 a lawsuit. Plaintiffs' attempt at service here has failed to comply with the most
 10 fundamental rules and is fatally ineffective. Realizing this, their opposition
 11 misstates both U.S. and South African law, and plaintiffs provide no support for
 12 their erroneous interpretation that it is "reasonable, then, to assume that others
 13 [rather than just the sheriff under South African law]" may effect service. (*See*
 14 *Opposition*, at pg. 2, line 11.)

15 Curiously, plaintiffs try to shift the burden back onto Bumbo-Pty by arguing
 16 that Bambo-Pty's motion did not cite case law in support its allegation that service
 17 in South Africa must be accomplished by a sheriff, *see id.*, pg. 2, lines 5-7,
 18 although they seem to admit the South African Uniform Rules of Court
 19 (hereinafter "South African Uniform Rules") provide exactly that. (*See* South
 20 African Uniform Rules attached as Exhibit "A" to Declaration of Jeffrey M. Bortz
 21 in Support of Reply to Plaintiff's Opposition to Defendant Bumbo (Pty) Ltd's
 22 Amended Motion to Quash and Motion to Dismiss (hereinafter "Bortz
 23 Declaration"), referenced at para. 3 therein; and Exhibit "B" to Declaration of
 24 Jennifer J. Johnston in Support of Reply to Plaintiffs' Opposition to Defendant
 25 Bumbo (Pty) Ltd's Amended Motion to Quash Service and Dismiss for Insufficient
 26 Service of Process and Lack of Personal Jurisdiction (hereinafter "Johnston

Decl.”), referenced at para. 3 therein.)

At the outset it may be observed that lack of case law addressing a specific rule promulgated by the Chief Justice of South Africa and expressly made applicable to all proceedings in South Africa does not demonstrate that the rule is so variable that anything goes but shows, rather, that no reasonable person would dispute the plain meaning of such a clearly articulated rule.

Even though Bumbo-Pty does not have the burden of proving service was not made, Bumbo-Pty nonetheless has obtained a declaration from a South African practitioner with forty-years’ experience practicing before South African courts. This declarant is not counsel to any party in this action and was not made familiar with the factual background of the claims made in this case or with how plaintiffs attempted to serve Bumbo-Pty. (*See Bortz Decl.*, para. 1.)

As this declarant makes clear, the South African Uniform Rules provide that only the sheriff or a specifically designated representative from his office may effect personal service of any process on a company defendant. (*See Bortz Decl.*, para. 5.) The sheriff cannot accept judicial documents for service from a private litigant but must be expressly directed to effect service only by the court with jurisdiction in the geographical district in which the South African company is registered or has its principal office, and thus a plaintiff has the obligation to make a formal request of the responsible court to so direct the sheriff. (*See Bortz Decl.*, paras. 6 and 9) The sheriff must not only personally deliver the copy of the process but must also inform the “responsible employee” of the company to be served of the “nature and contents” of the document(s) to be served, as evidenced by an affidavit returned by the sheriff. (*See Bortz Decl.*, paras. 7 and 8.) Absolutely none of this was done by plaintiffs here; rather, they merely asked an employee (who was neither a sheriff nor specifically designated by the local

1 sheriff) of a company nearby to walk over a copy of the summons and complaint
2 and merely left it with the first person he saw.

3 In a further desperate act to mislead the Court, the Declaration of Jeremy R.
4 Fietz, in Support of Plaintiff's Opposition to Defendant Bumbo (Pty) Ltd's Motion
5 to Quash and Motion to Dismiss, attached copies of e-mail messages from
6 plaintiffs' counsel to Bumbo-Pty but can point to no reply from any Bumbo-Pty
7 representative, despite Mr. Fietz's claim that there are "emails between" plaintiffs'
8 counsel and Bumbo-Pty. Plaintiffs' latest representation to this Court, even if it
9 were based on fact as it is not, is unavailing, because service by electronic means
10 such as by e-mail or facsimile or letter under these circumstances is simply not
11 valid service under South African law. (*See* Bortz Decl., para. 4.)

12
13 **II**
14 **PLAINTIFFS HAVE FAILED TO COMPLY**
15 **WITH RULE 4 OF THE FEDERAL RULES OF CIVIL**
16 **PROCEDURE TO EFFECT SERVICE OF PROCESS**
17 **ON BUMBO (PTY) LTD.**

18 Bumbo-Pty is a company organized under the laws of South Africa with its
19 principal and *only* place of business in South Africa. Since Bumbo-Pty is located
20 in South Africa, service of process can *only* be effected by following Rule 4, which
21 is captioned "Service," of the South African Uniform Rules. (*See* Bortz Decl.,
22 para. 3.)

23 In claiming they have effected service, plaintiffs have further and
24 unequivocally failed to comply with Rule 4 of the Federal Rules of Civil Procedure
25 (hereinafter "FRCP" or "Fed. R. Civ. P."). The FRCP pertaining to service upon
26 foreign corporations provide that service shall be made upon a domestic or foreign
27

1 corporation at a place not within any judicial district of the United States, in any
 2 manner prescribed by FRCP 4(f) for serving an individual, except personal delivery
 3 under Rule 4(f)(2)(C)(i). (*See* Fed. R. Civ. Proc. 4(h)(2).) In relevant part, FRCP
 4 Rule 4 specifically provides as follows:

5
 6 Unless federal law provides otherwise, an individual -- other
 7 than a minor, an incompetent person, or a person whose waiver has
 8 been filed -- may be served at a place not within any judicial district
 9 of the United States:

10 (1) by any internationally agreed means of service
 11 that is reasonably calculated to give notice, such as those
 12 authorized by the Hague Convention on the Service
 13 Abroad of Judicial and Extrajudicial Documents;

14 (2) if there is no internationally agreed means, or if
 15 an international agreement allows but does not specify
 16 other means, by a method that is reasonably calculated to
 17 give notice:

18 (A) *as prescribed by the foreign country's*
 19 *law for service in that country in an action in its*
 20 *courts of general jurisdiction;*

21 (B) as the foreign authority directs in
 22 response to a letter rogatory or letter of request; or

23 (C) *unless prohibited by the foreign*
 24 *country's law, by:*

25 (i) delivering a copy of the summons
 26 and of the complaint to the individual
 27 personally; or

28 (ii) using any form of mail that the
 clerk addresses and sends to the individual
 and that requires a signed receipt; or

(3) by other means not prohibited by international agreement,
 as the court orders.

1 Fed. R. Civ. P. 4(f). (Emphasis added.)

2 South Africa is not a party to the only relevant international convention on
3 service, the Hague Service Convention. (See the Status Table of the Hague Service
4 Convention attached as Exhibit “A” to Johnston Decl., referenced at para. 2
5 therein; Bortz Decl., para. 2.) Thus, service under FRCP Rule 4(f)(1) cannot be
6 effected. Further, FRCP Rule 4(h)(2) clearly states that personal service on a
7 foreign corporation is not considered good service. Plaintiffs are required to serve
8 Bumbo-Pty either under FRCP Rule 4(f)(2)(A) or (B).

9 Although it is defendant’s contention that a letter rogatory under FRCP Rule
10 4(f)(2)(A) is the only legal and appropriate manner in which to serve Bumbo-Pty,
11 plaintiffs have certainly not even attempted to comply with South Africa’s very
12 specific personal service requirements as required by FRCP Rule 4(f)(2)(A).
13 Indeed, plaintiffs realize this and do not even cite to the FRCP in defending their
14 attempted service. Rather, their Opposition cites only to FRCP Rule 4(f)(3), which
15 permits the Court to craft some other means of effective service and attempts to
16 use this residual clause as authority for the Court’s ignoring the clear meaning of
17 the FRCP and the South African Uniform Rules.

18 Plaintiffs also have not served the summons and complaint in compliance
19 with any order of this Court. Instead, they seek to coopt the Court into ratifying
20 their improper service after the fact. Plaintiffs further have made no showing of
21 any effort to comply with FRCP Rule 4(2)(A) or (B). Instead, they blatantly
22 ignore the rules and want to invite the Court to use its plenary power to subvert and
23 negate the plain directives of the FRCP applicable to all other litigants in federal
24 court and allow plaintiffs here to proceed. FRCP Rule 4(f)(3) clearly was not
25 intended to be so abused or absurdly interpreted, as plaintiffs will have it.

26 Simply put, plaintiffs are required to serve Bumbo-Pty, a South African
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company, either under subsection FRCP Rule 4(f)(2)(A) [method prescribed by foreign country's law of service] or FRCP Rule 4(f)(2)(B) [as foreign authority directs in response to letter rogatory]. Plaintiffs have not attempted the letter rogatory process, despite the fact that plaintiffs' counsel in other related cases have done so and have so informed counsel for plaintiffs here. (*See Johnston Decl.*, para. 5.) The South African Uniform Rules specifically state that service of process in South Africa on a company is effected only as follows:

Service of any process of the court directed to the sheriff . . .
 any document initiating application proceedings shall be effected by
 the sheriff in one or other of the following manners:

. . .

(v) in the case of a corporation or company, by
 delivering a copy to a responsible employee thereof at its
 registered office or its principal place of business within
 the court's jurisdiction, or if there be no such employee
 willing to accept service, by affixing a copy to the main
 door of such office or place of business, or in any manner
 provided by law.

South African Uniform Rules, Rule 4(1)(a), attached as Exhibit "A" to Bortz Decl. and as Exhibit "B" to Johnston Decl.

The law of South Africa simply does not recognize any other form of service in these circumstances on a company in South Africa to be legitimate. (*See Bortz Decl.*, para. 3.)

Plaintiffs and their counsel have failed to offer any explanation of their blatant disregard of FRCP Rule 4 and have ignored advice of plaintiffs' counsel in related cases. Plaintiffs here should not be rewarded for their continuous and

1 blatant disregard of the basic rules of civil procedure, as here.

3 III

4 THE DOCTRINE OF INTERNATIONAL COMITY PROVIDES THAT 5 THE INTERESTS OF SOUTH AFRICA IN SERVICE OF PROCESS 6 INSIDE ITS BORDERS SHOULD BE PARAMOUNT.

7 The U.S. Supreme Court has invoked comity as a central rationale, the
8 justification and the model, for its decisions involving foreigners in U.S. litigation.
9 *See, e.g., Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 108 S.
10 Ct. 2104, 2108, 100 L. Ed. 2d 722, 731 (1988) (“we almost necessarily must refer
11 to the internal law of the forum state” to find a service of process standard if a
12 treaty “does not prescribe” it); *Societe Nationale Industrielle Aerospatiale v.*
13 *United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 539-40, and n.
14 25, 107 S. Ct. 2542, 2553, and n. 25, 96 L. Ed. 2d 461, 481 and n. 25 (1987)
15 (holding that compliance with the Hague Evidence Convention is mandatory not
16 optional because of comity). In *Aerospatiale*, the Supreme Court observed that the
17 substantial question in that case was whether “there is in fact a true conflict
18 between domestic and foreign law.” *Société Nationale Industrielle Aérospatiale*,
19 *supra*, 482 U.S. at 555, 107 S. Ct. at 2562, 96 L. Ed. 2d at 491 (1987); *see also*
20 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798, 113 S. Ct. 2891, 2910,
21 125 L. Ed. 2d 612, 640 (1993) (citing *Aerospatiale* for same).

22 Even assuming *arguendo* that plaintiff’s form of service could be excused
23 under the FRCP if attempted on a domestic entity, the refusal of South Africa to
24 countenance less than sufficient service under the South African Uniform Rules
25 means that this Court should defer to the South African law under the doctrine of
26 international comity. A U.S. court should not reward plaintiffs for their continuous
27

1 and blatant disregard of the law of the country wherein Bumbo-Pty is located, as
 2 here, because such disregard of another sovereign's law would unnecessarily and
 3 adversely affect the foreign relations between the two national governments.

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9 IV

10 PLAINTIFFS HAVE FAILED TO ESTABLISH FACTS 11 SUFFICIENT TO SUPPORT AN ASSERTION OF PERSONAL 12 JURISDICTION OVER BUMBO (PTY) LTD.

13 Plaintiffs argue that Bumbo-Pty "completely misses the mark in its
 14 analysis of personal jurisdiction." (Opposition, at pg. 3, lines 4-5.) Plaintiffs then
 15 quote extensively from this court's decision in *Seltzer Sister Bottling Co., Inc. v.*
 16 *SourcePerrier, S.A.* 1991 WL 2729273 (N.D. Cal.) Counsel remarks that
 17 somehow Bumbo-Pty missed the "all fours" opinion of the court in its legal
 18 research. (Opposition, at pg. 9, lines 11-12.)

19 The court in *Seltzer* addressed an action pursuant to section 43(a) of the
 20 Lanham Act, alleging unfair competition by means of false or deceptive
 21 advertising. In *Seltzer*, defendant's motion to dismiss for lack of personal
 22 jurisdiction under FRCP Rule 12(b)(2) was denied. However, the facts in *Seltzer*
 23 vary greatly from the case at hand.

24 The *Seltzer* action stemmed from a voluntary recall of Perrier bottled water
 25 in the United States after certain bottles were found to contain trace amounts of
 26 benzene. The plaintiff there alleged that since Perrier was marketed as "naturally
 27

sparkling,” this advertising was false and misleading in violation of the Lanham Act. The *Seltzer* court found that Great Waters of France, a Connecticut corporation, was created to serve as defendant’s exclusive exporter and distributor of Perrier in the United States. This was found to be part of an American initiative by defendant concentrating on certain geographical areas, including the state of California, since these areas represented nearly two-thirds of American consumption. Further, it was found that California was a key segment of defendant’s mineral water market. Moreover, “out of the total dollar volume of \$118 million for Perrier water sold in the United States in 1989, five hundred thousand dollars (\$500,000) of those sales were generated by San Francisco County alone.” The *Seltzer* court found that “[t]hese facts do not evidence simply a ‘mere awareness’ on the part of Source Perrier that certain bottles of Perrier water were swept into California by the stream of commerce. Instead, they evidence an intent to channel that stream, and to shape it and ensure its growth.” *Seltzer Sister Bottling Co., Inc.*, 1991 WL 279273 at *6.

Unlike the *Seltzer* case, there has been no showing here that Bumbo-Pty focused on the California market. Bumbo-Pty did not create a company to serve as its distributor in California, or anywhere else in the United States.

Without repeating the same arguments from defendant’s original motion to set aside the default originally scheduled to be heard on March 10, 2008, and now taken under submission, the pertinent facts have not changed: Bumbo (Pty) Ltd. has taken no action purposely to avail itself of the California market; Bumbo (Pty) Ltd. has no offices, agents, or distributors in California; Bumbo (Pty) Ltd. has no address or telephone number in California; Bumbo (Pty) Ltd. has no real property in California. Further, unlike the finding in *Seltzer*, there is not a shred of evidence that Bumbo (Pty) Ltd. intended to focus its marketing and sales in California.

1 There has been no representation made that there was a higher percentage of sales
 2 in California than in any other state. Further, plaintiffs have not shown that
 3 Bumbo-Pty had *any* role in marketing and distribution in California.

4 Plaintiffs' representation that the *Seltzer* case is analogous to the case
 5 at hand is not enough to make it so; the facts are inapposite and the holding is not
 6 relevant here.

7 CONCLUSION

8 Plaintiffs argue that even if they did not follow either U.S. or South African
 9 law of service, it should make no difference. They invite the Court to collude with
 10 them in nullifying the law governing service that all other litigants in federal court
 11 must follow, as set forth in the FRCP.

12 The Court should reject plaintiffs' self-serving invitation. Bumbo-Pty has
 13 not been served in this action, has not appeared in this action and does not have
 14 any contacts, let alone constitutionally required minimum contacts, with the forum
 15 state of California.

16 Bumbo-Pty accordingly hereby requests that the summons and complaint
 17 hand-delivered by an individual not designated by the local sheriff, and thus
 18 insufficient under South African law, be quashed, and Bumbo-Pty be dismissed
 19 from this action.

20
 21 Dated: March 10, 2008

CONDON & FORSYTH LLP

22 By: s/Jennifer J. Johnston

23 ROD D. MARGO
 24 JENNIFER J. JOHNSTON

25 Attorneys for *Specially Appearing*
 26 Defendant
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